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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HILLER SYSTEMS INCORPORATED, *et al.*
Petitioners,

v.

ISABELLA SERVIS, Administratrix
of the Estate of Peter Thomas Humphrey,
Respondent.

Petition for Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Should subcontractors of the United States which are hired to perform duties of the general operating agent aboard vessels of the United States ever be deemed to be "agents" of the United States, and therefore immune from suit under the Suits in Admiralty Act?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Hiller Systems, Inc. ("Hiller"), Norfolk Shipbuilding and Drydock Corporation ("Norshipco") and Hiller employees, Jason B. Nuss, Wayne Francis Muth, and Edward Speary, III, and respondents Isabella Servis ("Servis"), Administratrix of the Estate of Peter T. Humphrey and the United States of America.

Michael G. Miller, executor of the Estate of LCDR William B. Turek and Sadie R. Richardson, administratrix c.t.a. of the Estate of William B. Turek filed briefs as *Amici Curiae*.

Pursuant to Rule 29.1 of the Rules of the Supreme Court, the Court is advised that the Norshipco does not have a parent company or a subsidiary that is not wholly-owned. Hiller Systems, Inc. is wholly owned by Hiller Investments Incorporated, which is wholly owned by The Hiller Group, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated May 16, 1995, is reported at 54 F.3d 203 (4th Cir. 1995) and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States District Court for the Eastern District of Virginia dated July 6, 1994, is reported at 858 F. Supp. 590 and is reproduced at Pet. App. 16a. The Order of the United

States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated July 18, 1995, is not published and is reproduced at Pet. App. 42a.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1995. Pet. App. 3a. The court of appeals denied a timely Petition for Rehearing on July 18, 1995. Pet. App. 42a. The jurisdiction of the district court was based upon the maritime and admiralty jurisdiction established in 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

Section 745 of the Suits in Admiralty Act, 46 U.S.C. App. § 745 provides:

> § 745. **Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be

exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further*, That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further*, That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest.

STATEMENT OF THE CASE

This case arose out of a casualty aboard the M/V CAPE DIAMOND, a cargo vessel owned by the United States and operated through its agency, the United States Maritime Administration ("MARAD"). MARAD contracted with Marine Transport Lines, Inc. ("MTL") to operate and maintain a fleet of vessels known as the Ready Reserve Force ("RRF"), which included the CAPE DIAMOND, under a Ship Manager's Agreement ("the Agreement"). Under the

Agreement, MTL agreed to provide "management, personnel, operational and technical support, and supplies to maintain ships of the RRF and operate when tasked as specified." There is no dispute that MTL, in operating and maintaining the RRF, was an agent of the United States.

In March of 1992, MTL, acting under the authority of the Agreement, delegated a portion of its operational responsibility to Norshipco to deactivate the CAPE DIAMOND. In September, 1992, Norshipco in turn delegated to Hiller the responsibility to test, deactivate, repair and then reactivate the low pressure carbon dioxide ("CO_2") fire extinguishing system. In November 1992, however, it was decided that the CAPE DIAMOND would not be deactivated, but instead placed on reduced operating status. MARAD later determined that the CAPE DIAMOND was to be fully reactivated. During February and early March, 1993, the personnel of MARAD, Norshipco, MTL and Hiller were all working together in reactivating the CAPE DIAMOND.

MTL requested Hiller to assist the Coast Guard and MTL to test the CAPE DIAMOND's CO_2 fire suppression system to obtain certification by the U.S. Coast Guard. On March 3, 1993, the various required tests were performed by Hiller under the supervision and coordination of MTL and a Coast Guard inspector supervising the inspections. As part of the test, the system was supposed to emit a small "puff" of CO_2 in the CAPE DIAMOND engine room, to ensure that the system functioned properly. However, during the test, a large amount of CO_2 was released into the engine room where Peter T. Humphrey, an electrical technician was working. During the course of the test, he was asphyxiated and died.

Respondent, Isabella Servis ("Servis"), Administratrix of the Estate of Peter T. Humphrey, filed a motion for judgment in the Circuit Court for the City of Norfolk against

the Defendants. Norshipco removed the action to the United States District Court for the Eastern District of Virginia, alleging that the complaint stated a federal question under the Suits in Admiralty Act, 46 U.S.C. App. § 741, *et seq.* (SAA), or under the Public Vessels Act, 46 U.S.C. App. § 781, *et seq.* (PVA), or both, and that the exclusive remedy was suit against the United States in federal court. Norshipco then filed a third-party complaint against the United States. Each of the Defendants asserted that they were agents of the United States under the SAA and/or PVA, and therefore they were immune from suit.[1] Servis filed a motion to remand based upon the savings to suitors clause of 28 U.S.C. § 1333. The district court denied the motion to remand and dismissed the action against the Defendants, finding that they were agents of the United States for the purposes of the SAA and, therefore, Servis's sole and exclusive remedy is suit against the United States in federal court. Pet. App. 39a.

Servis and the United States filed Notices of Appeal to the United States Court of Appeals for the Fourth Circuit.[2] The Fourth Circuit reversed the district court's opinion and remanded the case for trial on the merits. It is for a review

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[1] The Defendants filed motions to dismiss the case, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The district court converted the motions to dismiss to motions for summary judgment pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[2] Michael G. Miller, executor of the Estate of LCDR William B. Turek, filed a motion for leave to file brief as *Amicus Curiae* in support of the appeals of Servis and the United States, which was granted by the court of appeals. Miller later filed a motion to substitute *Amici Curiae* and adding Sadie R. Richardson, administratrix c.t.a. of the Estate of LCDR William B. Turek *("Amici")*.

of this opinion that the Defendants seek a writ of *certiorari.*

REASONS FOR GRANTING THE WRIT

This Court's attention is warranted to address the significant legal and practical consequences of the opinion below. This case involves interpretation of the Suits in Admiralty Act, 46 U.S.C. App. § 741, *et seq.* (SAA), which has wide ranging application to the commercial and maritime interests of the United States and its agents. The SAA waives sovereign immunity of the United States and provides that where a maritime cause of action exists against an agent or employee of the United States or an incorporated or unincorporated agency thereof, the exclusive remedy is suit against the United States in federal court. 46 U.S.C. App. § 745. This statute provides the United States the assurance that its vessels will not be seized and that all issues or claims against the sovereign and its agents arising out of the operation of a vessel will be resolved in a single federal court proceeding. This Court and the courts of appeals in the Third and Fourth Circuits have adopted a broad interpretation of the term "agent" as it is used in the SAA. The Fourth Circuit, in the opinion below, however, adopted a narrow interpretation of the term "agent," and reversed the district court's ruling that the Defendants were agents of the United States.

Although this Court has not decided whether subcontractors are covered under the SAA, several lower federal courts have held that subcontractors hired to perform obligations of general operating agents of the United States are agents of the United States, and therefore immune from suit under the SAA. *Walters v. Tidewater Fleet, Inc.*, 847 F. Supp. 464 (E.D. La. 1994); *Servis v. Hiller Systems, Inc.*, 858 F. Supp. at 600, *rev'd*, 54 F.3d 203 (4th Cir. 1995); *Bowman v. Pan American World Services, Inc.*, 704 F. Supp. 695

(E.D. La. 1989); *Saffrhan v. Buck Steber, Inc.*, 433 F. Supp. 129 (E.D. La. 1977).

These decisions are consistent with the unique statutory scheme of the SAA and the applicable case law which contemplates that all claims resulting from an accident on a United States vessel will be resolved in one forum. They are also consistent with the broad interpretation of the term "agent" adopted by this Court and by the Third and Fourth Circuits in other cases. The Fourth Circuit in the opinion below, however, found that subcontractors who perform delegated obligations of the general operating agents were not agents of the United States under the SAA. Pet. App. 14a-15a. In so ruling, the court turned from the cases decided under the SAA, but instead relied on cases decided under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (FTCA), which does not even contain the term "agent." Although the SAA does not require privity of contract for an agency relationship, the court below implicitly read such a requirement into the statute, contrary to established principles of agency law.

This case presents an important question of federal law which has not been, but should be, settled by this Court. This Court should determine whether subcontractors may be considered agents of the United States, and therefore immune from suit under the SAA. Otherwise, federal control over maritime litigation may be lost and the various courts will decide on a case-by-case basis whether subagents of the United States are subject to suit in state court. This will not only result in a lack of uniformity in decisions, but will also result in infringement on federal supremacy, as it will permit state courts to decide the issue, and thereby decide the extent

of federal jurisdiction under the SAA.[3] Furthermore, unless this issue is decided by this Court, the United States may be subject to state court jurisdiction, as the United States will likely be brought in as a third party defendant by maritime subcontractors. The opinion below should not remain standing as it will also defeat the essential purposes of the SAA as pronounced by this Court in *Johnson v. U.S. Shipping Bd. Emerg. Fleet Corp.*, 280 U.S. 320 (1929), *overruled in part, Brady v. Roosevelt S.S. Co.*, 318 U.S. 799 (1943).[4]

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[3] State courts have decided whether the SAA applies and, thus, whether the federal court has jurisdiction over the parties, which may include the United States. *See e.g. Farmers State Bank of Brookshire v. Lewellen*, 409 S.W.2d 908 (Tex. Civ. App. 1966); *Irving J. Epstein & Co. v. Southern Ry. Co.*, 318 Ill. App. 184, 47 N.E.2d 736 (1943); *Shea v. Export S.S. Corp.*, 253 N.Y. 17, 170 N.E. 477 (1930).

[4] Although *Johnson* was overruled in part by *Brady*, the 1950 amendment to the SAA restored the principles of the *Johnson* decision. The Senate Report stated that the amendment codified the exclusivity principle announced in *Johnson* and two other cases. In discussing the Senate Report, the Third Circuit concluded in *Petition of the United States*, 367 F.2d, 505, 510 (3d Cir. 1966), *cert. denied.*, 386 U.S. 932, *reh. denied*, 386 U.S. 1000 (1967):

> [t]hus, it is reasonable to infer from the quoted language of the legislative analysis that Congress intended to restore the *Johnson* decision in its entirety and in so doing to make governmental liability exclusive throughout a broad spectrum of contractual arrangements for the operation of public vessels. . . .

In *Johnson*, this Court explained that the SAA relieved the United States of the inconvenience of seizures of its vessels and provided potential claimants with an *in personam* remedy against the United States. *Id.* at 326. The SAA also required the adjudication of all maritime claims arising out of the possession or operation of United States vessels in one proceeding in federal court. In *Johnson*, this Court further explained that this assures uniformity as to venue, service of process, rules of decision and procedure, rate of interest and periods of limitation. *Id.* Whether these principles should be applied to subcontractors which meet the requirements of an "agent," is a question which has not been, but should be, decided by this Honorable Court. This issue has a profound effect on the relationship between the United States and its subcontractors hired to perform duties on vessels owned or operated by the United States. The petition for a writ of *certiorari* should be granted as this case provides an appropriate vehicle for the resolution of this important question of maritime law and policy which is of national and international concern.

BECAUSE THE FOURTH CIRCUIT MISINTERPRETS THE EXCLUSIVITY PROVISION OF THE SUITS IN ADMIRALTY ACT, THE OPINION SHOULD BE CORRECTED.

The opinion below, which reversed the district court's determination that the Defendants were agents of the United States, and therefore immune from suit, misinterprets the meaning of the term "agent" as it is used in the SAA. Under the SAA, the United States waives its sovereign immunity for maritime causes of action, 46 U.S.C. App. § 742, and provides that the exclusive remedy for anyone injured aboard a United States vessel by the United States or its agents is

suit *solely* against the United States:

> [w]here a remedy is provided by [the SAA] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim . .
>
> .

46 U.S.C. App. § 745. After considering the applicable case law and principles of agency law, the district court in the instant case concluded that the defendant subcontractors were agents of the United States within the meaning of the SAA. Pet. App. 38a.

The district court's ruling is consistent with the cases decided by the other federal courts which have held that subcontractors of the United States which were delegated to perform duties of the general operating agent were immune from suit as agents of the United States pursuant to the SAA. *See Walters v. Tidewater Fleet, Inc.*, 847 F. Supp. 464 (E.D. La. 1994);[5] *Bowman v. Pan American World Services, Inc.*, 704 F. Supp. 695 (E.D. La. 1989); *Saffrhan v. Buck Steber, Inc.*, 433 F. Supp. 129 (E.D. La. 1977).[6] The district court in the instant case followed *Bowman and Saffrhan*, which support the holding that the Defendants were agents of the United States.

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[5] *Walters* was decided after the district court ruled in the instant case.

[6] The only case in which a subcontractor was found not to be an agent of the United States is *Woody v. American Heavy Industries, Inc.*, Civ. Action No. 2:94cv233 (E.D. Va. 1994), an unpublished decision.

In these cases, the courts explained why subcontractors of the United States should qualify as agents of the United States under the SAA. In *Bowman*, an employee of a subcontractor who was injured on a barge owned by the United States, filed suit against the United States, the contractor and the subcontractor. The subcontractor was hired to perform testing services involved in the operation of rocket fuel systems on barges. The court found that because the contractor operated facilities and systems under its contract with the government, it was an agent of the United States and, therefore, immune from suit under the SAA. *Id.* at 697-98. Significantly, the court also found that the subcontractor was an agent of the United States because the subcontractor "was performing a part of [the contractor's] obligations as an agent of the United States." *Id.* at 697.

Similarly, in *Saffrhan*, the employee of a dredging firm which was a subcontractor of the United States was injured while assisting in the removal of wrecks from the Suez Canal. The court held that the exclusivity provision of the SAA prevented the employee from maintaining his lawsuit against the subcontractor, who was hired to perform diving services. *Id.* at 134. According to the court, "[the contractor] could not, by subcontracting part of its responsibilities, alter the rights and obligations either of the United States or of employees enjoying a Jones Act status on a public vessel." *Id; see also Walters v. Tidewater Fleet, Inc.*, 847 F. Supp. 464 (E.D. La. 1994) (the SAA precludes a seaman from asserting a claim against a subcontractor of the United States even where the subcontractor was not in direct contractual privity with the United States).

These decisions are consistent with the unique statutory scheme of the SAA and the applicable case law which mandates a broad interpretation of the term "agent," as explained by this Court. The SAA was enacted in 1920 in

response to the decision in *The Lake Monroe*, 250 U.S. 246 (1919), which held that a libel *in rem* would lie against United States vessels. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 170 (1976). In *Johnson v. U.S. Shipping Bd. Emerg. Fleet Corp.*, 280 U.S. 320 (1929), *overruled in part, Brady v. Roosevelt S.S. Co.*, 318 U.S. 799 (1943), this Court explained that prior to the passage of the SAA, merchant vessels of the United States were subject to seizure and its agents were liable to be sued in state or federal courts on causes of action arising out of the operation of such ships. *Id.* at 325. "The Act relieved the United States of the inconvenience resulting from such seizures and gave remedy by libel *in personam* against the United States and such corporations." *Id.* This Court further explained the purpose and advantages to the United States of the SAA's waiver of immunity:

> [i]t provides a remedy in admiralty for adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant vessels of the United States and the corporations, in which the obligation of the United States is substituted for that of the corporations. To that end it furnishes a complete system of administration, applying to the United States and the corporations alike, by which uniformity is established as to venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation. . . .

Id. at 326. In 1950, the SAA was amended to confirm the exclusivity principle and to extend the statute of limitations for claims under the SAA for plaintiffs whose suits had been dismissed because they were improperly brought against the government's agents.

Although this Court has not decided the issue of whether subcontractors may be agents of the United States under the SAA, it has indicated that a broad interpretation of the term "agent" is appropriate. In *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 795 (1949), this Court stated that "such words as employer, agent, independent contractor are not decisive." Likewise, in *Petition of United States*, 367 F.2d 505, 511 (3d Cir. 1966), *cert. denied*, 386 U.S. 932, *reh. denied*, 386 U.S. 1000 (1967), the Third Circuit stated that "Congress intended to make governmental liability exclusive throughout *a broad spectrum of contractual arrangements* for the operation of public vessels." (emphasis added).

In *Smith v. United States*, 346 F.2d 449, 453-54 (4th Cir. 1965), *cert. denied*, 382 U.S. 878 (1965), the Fourth Circuit explained that:

> [t]he intent of the 1950 amendment to the Suits in Admiralty Act, promulgating the proviso excluding the agent from suability, was not to keep alive the liability of a private person, firm or corporation having charge of a Government ship. It was just to the contrary. It was the adoption by Congress of the exclusivity principle enunciated in *Cosmopolitan Shipping Co. v. McAllister, supra*, 337 U.S. 783, 69 S. Ct. 1317. *Another purpose was to designate unequivocally the one to whom a claim for loss caused by the Government's ship should be directed. . . .* The legislative history avows this intent and object of the Act.

(Emphasis added). The court also stated that "[w]hether the agreement constituted [the operator] a charterer, an owner *pro hac vice* or an independent contractor is merely an academic

ascertainment." *Id.* at 453.

The court below, however, adopted a narrow interpretation of the term "agent" based on its view of the potential ramifications on future cases. The court stated that it declined to hold the Defendants agents of the United States because to do otherwise

> raises the specter of governmental liability to every act of negligence by a painter or plumber engaged to perform some limited task aboard a United States vessel, regardless of that party's contractual relationship with the government.

Pet. App. 15a. It is apparent that the Fourth Circuit interpreted the statute to reach a particular result, which effectively holds that subcontractors can never be considered agents under the SAA. The opinion below, which has broad reaching effects, should not remain standing, because it fails to consider and apply the broad interpretation of the statute adopted by this Court and other courts of appeals.

THE OPINION BELOW IS CONTRARY TO CONGRESSIONAL INTENT.

The legislative history of § 745 reveals that Congress intended the term "agent" to be construed broadly. All of the cases which discuss the legislative history interpreting the term have reached the same conclusion. The district court in the instant case pointed out that in *Petition*, *supra*, the court found evidence in the Congressional history for a broad interpretation of the term "agent." Pet. App. 36a. When asked for comment on the bill which became § 745, the Department of Justice recommended that the "agent or "employee" language be expanded to read "employee, agent,

or instrumentality." In *Petition*, the court stated:

> [t]hereafter, in reporting the final and present text to the Congress, both House and Senate Committees explained "that the language suggested by the Department of Justice in respect of the exclusive provision constitutes an immaterial variation in the language of the bill as drawn." H. Rep. No. 1292 p.5. *This indicates that in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels were operated.*

Petition, 367 F.2d at 510 (emphasis added). The court below failed to recognize that the legislative history supports a finding that Congress intended the SAA to apply to a broad spectrum of entities furthering the interests of the United States.

THE CASE LAW DECIDED UNDER THE FEDERAL TORT CLAIMS ACT IS INAPPLICABLE TO DETERMINE AGENCY STATUS UNDER THE SAA.

This Court should grant this petition for a writ of *certiorari* to review the Fourth Circuit's application of case law decided under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (FTCA), to determine agency status under the SAA. *See* Pet. App. 13a (citing *Williams v. United States.*, 50 F.3d 299 (4th Cir. 1995) and *Leone v. United States*, 910 F.2d 46 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)). Although the SAA and FTCA both contain waivers of sovereign immunity, they are completely different statutory schemes. The FTCA waives sovereign immunity only for

the negligent or wrongful acts or omissions of *employees* of the United States. The question in the FTCA cases on which the court below relied, was whether the individual tortfeasors were employees or whether they were independent contractors of the United States. The case law decided under the FTCA does not interpret the term "agent" because that term is not contained in the statute. Thus, these courts never considered the issue of whether there was an agency relationship, the sole issue in the instant case.

Although independent contractors are not covered under the FTCA, it is clear that an independent contractor may be considered an "agent" under the SAA. *See e.g. Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 795 (1949) ("such words as employer, agent, independent contractor are not decisive."); *Smith v. United States*, 346 F.2d 449 (4th Cir. 1965), *cert. denied*, 382 U.S. 878 (1965) ("[w]hether the agreement constituted [the operator] a charterer, an owner *pro hac vice* or an independent contractor is merely an academic ascertainment."). In fact, in the instant case, the Fourth Circuit acknowledged that MTL was an independent contractor and was also an agent of the United States. *See* Pet. App. 11a-12a. Clearly, the terms "independent contractor" and "agent" are not mutually exclusive under the SAA. As the Third Circuit stated in *Petition*:

> [b]ut an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf.

Id. at 509 (citing RESTATEMENT (SECOND) of AGENCY § 14

N (1957) (RESTATEMENT)). The cases decided under the FTCA, a different statutory scheme which has a more limited waiver of immunity than the SAA, are inapplicable in determining agency status under the SAA. The opinion below should not remain standing as it confuses two very different federal statutory schemes by applying FTCA analysis to the SAA.

THE OPINION BELOW MISAPPLIES THE LAW OF AGENCY.

This Court should consider whether principles of agency law are applicable to analysis of agency status under the SAA. The opinion below disregarded the law of agency by implicitly requiring privity of contract in order to find an agency relationship: "[a]ppellees in fact were not even parties to the Ship Manager's Agreement between MARAD and MTL." Pet. App. 10a. Contrary to the opinion below, there is no privity requirement under general principles of agency law. As the Restatement of Agency provides:

> *[a] subagent* performing acts which the appointing agent has authorized him to perform in accordance with an authorization from the principal *is an agent of the principal and affects the relations of the principal to third persons as fully as if the appointing agent had done such acts.* Furthermore, *the subagent stands in a fiduciary relation to the principal, and is subject to all the liabilities of an agent to the principal,* except liability dependent upon the existence of a contractual relation between them.

RESTATEMENT § 5 (1957) (emphasis added). A subagent has the same fiduciary obligations to the principal as does an

agent and is subject to the same liabilities to the principal and third parties as is an agent.

This principle has been recognized by various federal courts in interpreting the term "agent" under the SAA. *See Rollins v. Board of Governors for Higher Education*, 761 F. Supp. 933, 937 (D. R.I. 1991) ("the import of the [case law] is that an entity doing the work of the United States on a public vessel is in a true fiduciary relationship with the United States."); *Smith*, 346 F.2d at 453 (the legal title or categorization of the relationship is not determinative of agency status).

Moreover, "[t]he rules as to the power of an agent to subject the principal to liability are applicable to the power of a servant and of a subservant or other subagent." RESTATEMENT, *supra*, § 142. In *Saffrhan*, *supra*, the court made it clear that a prime contractor could not, by subcontracting part of its responsibilities, alter the rights and obligations either of the United States or of employees enjoying a Jones Act status on a public vessel. *Id.* at 134. Otherwise, general operating agents such as MTL would have the exclusive authority to defeat the purpose of the SAA merely by entering into subcontracts at their discretion. Clearly, this is a result not intended by Congress.[7] The Fourth Circuit, however, read into the statute a privity requirement where none exists.

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[7] The district court's ruling that the Defendants are agents of the United States within the meaning of the SAA is consistent with the legal principles of agency. As the court stated, "[a]pplying these broad agency principles to the facts of this case reveals that defendants should *obviously* be considered agents of the United States for the purposes of § 745." Pet. App. 37a (emphasis added).

The Fourth Circuit also considered the issue of whether or not the parties expressly consented to an agency relationship. Pet. App. 11a. The opinion overlooks the principle of agency law that consent may be implied as well as express. "[A]uthority to do an act can be created by written or spoken words *or other conduct of the principal* which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." RESTATEMENT, *supra*, § 26 (emphasis added); *see also* RESTATEMENT, *supra*, § 26, comment b ("The manifestations to the agent can be made by . . . any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief."). The United States manifested that the Defendants may act on the United States' account in managing and operating the CO_2 fire extinguishing system of the CAPE DIAMOND by its actions during the reactivation of the CAPE DIAMOND and testing its CO_2 system.[8] The subcontractors' consent may be manifested by their performance of delegated duties on United States vessels. *See* RESTATEMENT, *supra*, § 15, comment b (if agent performs act requested by principal, it is inferred that he acts as agent). To argue otherwise is to contend that subcontractors such as the Defendants do not act in furtherance of the United States' interests when they perform delegated operational duties aboard United States vessels.

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[8] In addition, the Agreement between MTL and the United States evidenced that MTL agreed to act as agent of the United States to manage and operate the CAPE DIAMOND and authorized MTL to delegate by contract some of its duties. MTL delegated some its operational responsibilities to the Defendants, over which the United States had control.

The opinion below also brings into question the degree and type of control necessary to establish an agency relationship under the SAA. The opinion ignores the well-accepted principle of agency law that day-to-day operational control is not necessary for such a relationship. According to the Restatement of Agency, "[t]he control of the principal does not . . . include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective." RESTATEMENT § 14, comment a.

Other federal courts which have considered the type of control necessary to establish an agency relationship under the SAA followed these principles of agency law. In *Bowman v. Pan American World Services, Inc.*, 704 F. Supp. 695 (E.D. La. 1989), the court had little difficulty in finding that the ultimate control by the United States over a subcontractor was sufficient to find it to be an agent of the United States under the SAA, stating that:

> [a]lthough the United States did not exercise day-to-day operational control over [the subcontractor's] activities, [the subcontractor] conducted the business of the United States pursuant to contract with [the contractor], and the United States retained ultimate control over the vessels and operations involved.

Id. at 698. This is the same operational control the district court found to be present in the instant case:

> the Agreement also gives the United States *ultimate power* over these contractors *even if this power was not exercised as day-to-day operational control*. . . . These defendants were undertaking projects on behalf of the United

> States, *and they were subject to the United States' approval and ultimate control and direction.*

Pet. App. 37a (emphasis added).[9] The opinion below clearly misapplies agency law in its interpretation of the term "agent" in the SAA.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted because this case involves the interpretation of an important federal statute which has a significant impact on the maritime commercial interests of the United States and its agents. The opinion below misinterprets the SAA, misapplies agency law and improperly relies on cases decided under the FTCA in determining agency status in order to reach a particular result. Because the FTCA waives immunity only for the torts of *employees* of the United States and not agents, application of case law decided under the FTCA is erroneous. Furthermore, the Fourth Circuit's determination that subcontractors of the United States cannot be agents of the United States under the SAA is based in part on the court's view of the ramifications of the decision on future cases. A review of the opinion below is warranted because this Court should decide whether the term "agent" as it is used in the SAA may include subcontractors.

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[9] Although the court below relied on *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), it failed to recognize that the Fifth Circuit affirmed the district court's factual finding that the United States exercised *no* operational control over the work of the contractor or the subcontractor. *See id.* at 445.

Respectfully submitted,

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HILLER SYSTEMS INCORPORATED, *et al.*
Petitioners,

v.

ISABELLA SERVIS, Administratrix
of the Estate of Peter Thomas Humphrey,
Respondent.

Petition for Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1979

Isabella Servis, Administratrix of the Estate of Peter Thomas Humphrey,

Plaintiff-Appellant,

v.

Hiller Systems Incorporated; Jason B. Nuss; Wayne Francis Muth; Edward Speary, III,

Defendants-Appellees,

and

Norfolk Shipbuilding & Drydock Corporation,

Defendant & Third Party Plaintiff-Appellee,

Valcon Sales and Services, Incorporated,

Defendant,

v.

United States of America,

Third Party Defendant.

Michael G. Miller, Executor;
Sadie R. Richardson,
Administratrix, c.t.a., of the Estate
of William B. Turek,

Amici Curiae.

No. 94-2103

Isabella Servis, Administratrix of
the Estate of Peter Thomas
Humphrey,
Plaintiff,

v.

Hiller Systems Incorporated;
Jason B. Nuss; Wayne Francis
Muth; Edward Speary, III,

Defendants-Appellees,

Norfolk Shipbuilding & Drydock
Corporation,

Defendant & Third Party Plaintiff-Appellees

Sadie R. Richardson,
Administratrix, c.t.a., of the Estate
of William B. Turek,

Amicus Curiae,

and

Valcon Sales and Services,
Incorporated,

Defendant,

v.

United States of America,

Third Party Defendant-Appellant.

Michael G. Miller, Executor of the
Estate of William B. Turek,

Amicus Curiae.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge
(CA-94-202-2)

Argued: April 4, 1995

Decided: May 16, 1995

Before WIDENER and WILKINSON, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Widener and Senior Judge Chapman joined.

COUNSEL

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OPINION

WILKINSON, Circuit Judge:

Appellant Isabella Servis brought suit in Virginia state court against several contractors and subcontractors engaged to perform maintenance and repair tasks aboard a United States vessel, the M/V CAPE DIAMOND. Servis alleged that appellees' negligence resulted in the death of Peter Thomas Humphrey, who was working aboard the vessel. Appellees removed the action to federal district court, arguing that Servis' suit stated a claim under the Suits in Admiralty Act ("SAA"), 46 U.S.C. app. §§ 741-752, and the

Public Vessels Act ("PVA"), 46 U.S.C. app. §§ 781-790. The district court agreed, holding that appellees should be considered agents of the United States for purposes of the SAA's "exclusivity provision," 46 U.S.C. app. § 745, and that Servis' exclusive remedy was therefore against the United States in federal court. *Servis v. Hiller Sys., Inc.*, 858 F.Supp. 590, 599-600 (E.D. Va. 1994). We think the conclusion that appellees were "agents," however, overlooks general principles of agency law, the text of the statute itself, and the potentially vast liability such a reading could impose on the United States. Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

A.

The United States owns the M/V CAPE DIAMOND, a "roll on/roll off" cargo ship, through the United States Maritime Administration ("MARAD"), an agency of the Department of Transportation. The CAPE DIAMOND is part of a fleet of vessels known as the Ready Reserve Force ("RRF"). MARAD bears primary responsibility for maintaining the RRF. In order to accomplish this objective, MARAD contracts with private companies to maintain and operate the vessels.

At the time of the accident underlying this litigation, the CAPE DIAMOND was being operated for MARAD under a "Ship Manager's Agreement" by Marine Transport Lines, Inc. ("MTL"), a private corporation. Under the Agreement, MTL was designated "Ship Manager" for the CAPE DIAMOND and other RRF vessels. The Agreement also referred to MTL as a "general agent" and described itself as a "general agency agreement." Pursuant to the Agreement,

MTL consented to provide management, operational, and technical support for RRF vessels.

As Ship Manager, MTL engaged contractors to carry out certain of its responsibilities. The government agreed to reimburse MTL for the approved fees and expenses of such contractors. MTL in turn agreed to exercise due diligence in selecting contractors and to terminate any contractor not satisfactory to the government upon receiving written notification.

In May of 1992, MTL contracted with Norfolk Shipbuilding and Drydock Company ("Norshipco") to "deactivate" the CAPE DIAMOND.[1] In October, Norshipco in turn subcontracted some of the work on the CAPE DIAMOND to Hiller Systems, Inc. Specifically, Hiller was engaged to inspect the ship's carbon dioxide (CO_2) fire suppression system. As part of a "condition report" later submitted to Norshipco, Hiller reported that there were leaks in the aft CO_2 tank valve and recommended repair or replacement of the valve.

By purchase order dated December 3, 1992, Norshipco authorized Hiller to proceed with repairs to the CO_2 system. On December 15, 1992, Hiller removed several valves, including the aft tank main shut-off valve, and sent them to Valcon Sales and Services, Inc. for inspection, testing, and repair. In late December, Valcon tested the

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[1]In November of that year, a decision was made to put the CAPE DIAMOND on "reduced operating status" rather than deactivate the vessel. Accordingly, a new contract between MTL and Norshipco apparently replaced the preexisting agreement.

valves and returned them to Hiller.[2] In early January 1993, Hiller employees reinstalled the valves.

On March 1, 1993, Michael Ford, a representative of MTL, hired Hiller to test the fire suppression system and certify it to the Coast Guard. The parties entered a separate agreement: rather than acting as a subcontractor to Norshipco, on this occasion Hiller was retained directly by MTL. Ultimately, MTL ratified Hiller's work on the fire suppression system via a confirmation purchase order.

The CAPE DIAMOND's fire suppression system was scheduled to be tested and certified on March 3, 1993. Hiller employees conducted the test, which requires a release of carbon dioxide in various areas of the ship to ensure that timing devices, system valves, dispersement nozzles, and alarms operate properly. The Hiller employees chose to test the system in the engine room first. They did not, however, order an evacuation of the engine room or otherwise ensure that no one was present in that area.

Hiller's employees planned to conduct a "puff test" by releasing a small amount of carbon dioxide into the engine room to activate the timing devices, system valves, and alarms. Because the aft tank main cut-off valve was not completely closed during the test, however, a massive amount of CO_2 flooded the engine room. Humphrey, an electrical technician employed by a non-party to this suit, was working in the CAPE DIAMOND's engine room. Both Humphrey and a Coast Guard Marine Safety Inspector were asphyxiated

---

[2]Valcon insists that it did not inspect the particular valve at issue in this case. As the district court noted, however, resolution of this factual dispute is not material to the question before us -- namely, the interpretation of the term "agent" in the SAA.

by the CO_2 released during the test.

B.

As administratrix of Humphrey's estate, Servis filed suit in the Circuit Court for the City of Norfolk, naming as defendants Norshipco, Valcon, Hiller, and various Hiller employees. She alleged that the defendants were negligent in their performance of the CO_2 test. The complaint did not, however, name the United States, MARAD, or the prime contractor, MTL.

In February, Norshipco removed the action to federal district court, contending that the SAA and PVA provide an exclusive federal forum for Servis' claims. Section 745 of the SAA, the "exclusively provision," declares that "where a remedy is provided by [the SAA] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . whose act or omission gave rise to the claim." 46 U.S.C. app. § 745. The PVA incorporates the SAA's exclusivity provision. 46 U.S.C. app. § 782.

Subsequent to removal, all defendants filed motions to dismiss, arguing that Servis' sole remedy was against the United States under § 745. Servis in turn filed a motion to remand to state court based upon the "saving to suitors" clause of 28 U.S.C. § 1333 and *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959). The district court determined that appellees were agents of the United States for purposes of the SAA's exclusivity provision. *Servis*, 858 F.Supp. at 599, 600. The court therefore denied Servis' motion to remand. Servis and the United States appeal.

II.

Section 1333, the statute establishing the admiralty jurisdiction of the federal courts, provides in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Section 1333's "saving to suitors" clause preserves a maritime suitor's election to pursue common-law remedies in state court. The Supreme Court has determined that such a claim brought pursuant to the saving to suitors clause in state court should not be removable on the ground of general federal question jurisdiction. *See Romero*, 358 U.S. at 371-72. Admiralty and maritime cases may, however, be removable to federal court when there exists some independent basis for federal jurisdiction, such as diversity of citizenship, *see, e.g., In re Dutile*, 935 F.2d 61, 63 (5th Cir. 1991), or when federal jurisdiction is independently established by a federal maritime statute. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 3-13 at 117-18 (1987). The SAA or PVA would provide just such an independent basis for federal jurisdiction if they apply. Those statutes permit an action against the United States where the "act or omission" of an "agent or employee of the United States" gave rise to the claim. *Williams v. Central Gulf Lines*, 874 F.2d 1058, 1059-60 (5th Cir. 1989), *cert. denied.*, 493 U.S. 1045 (1990). Where the PVA or the SAA provides a remedy against the United States, there is no recourse against the government agent whose actions engendered the lawsuit. *Manuel v. United States*, No. 94-1485, slip op. at 4 (4th Cir. Mar. 29, 1995); *Buck Kreihs Co. v. International Marine Carriers, Inc.*, 741

F.Supp. 1249, 1250-51 (E.D. La. 1990).

The question here, then, turns on the definition of "agent" under § 745. If in fact appellees are agents of the United States, the SAA declares that the sole remedy for Servis' claims is an action against the United States in federal court. By contrast, if appellees are not agents of the United States, then Servis' action may go forward against appellees in state court under the "saving to suitors" clause of § 1333.

III.

Appellees contend that they are "agents" of the United States within the meaning of § 745 and thus enjoy the immunity from suit conferred by that section. They reason that they were engaged to perform various tasks entrusted to MTL by the Ship Manager's Agreement and that the United States retained ultimate control over their performance of those tasks. In addition, appellees insist that *Petition of United States*, 367 F.2d 505, 510-11 (3d Cir. 1966), *cert. denied sub nom Allem v. Mathiasen's Tanker Indus., Inc.*, 386 U.S. 932 (1967), indicated that the term "agent" should be interpreted expansively for purposes of the exclusivity provision. We do not find this reasoning persuasive.

A.

To begin with, appellees' argument conflicts with basic principles of agency law that must guide our interpretation of the statutory term "agent." *See Nelson v. Research Corp. of Univ. of Hawaii*, 805 F.Supp. 837, 847 (D. Haw. 1992) ("use of general agency language in § 745 indicates that Congress intended that the traditional concept of agency should govern its application"). Restatement (Second) of Agency § 1(1) provides that an agency relationship is "the fiduciary relation which results from the

manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." According to the Restatement definition, appellees were in no sense "agents" of the United States when they were hired to perform limited repair tasks aboard the CAPE DIAMOND.

Appellees in fact were not even parties to the Ship Manager's Agreement between MARAD and MTL. To the contrary, Norshipco performed work under the terms of a ship repair contract issued by MTL, Hiller performed work under the terms of purchase orders executed by MTL and Norshipco, and Valcon performed work under the terms of a valve repair contract issued by Hiller. None of these documents evidences any intent on the part of the United States to enter into a fiduciary relationship with Norshipco, Valcon, or Hiller, nor do the document indicate that appellees consented to act as fiduciaries of the government. None of the documents refer to any appellee as an "agent" of the United States. *Cf. Nelsen*, 805 F. Supp. at 847 (bareboat charter agreement between United States Navy and putative agent is "primary piece of evidence as to the agency relationship between" Navy and plaintiff's employer.)

MTL, by contrast, was expressly engaged to serve as the United States' general or operating agent for the CAPE DIAMOND and was in fact the only party to consent to agency status with the United States in the Ship Manager's Agreement. The fact that the Ship Manager's Agreement contemplated that MTL would subcontract the performance of discrete tasks (including the testing and repair of the CO_2 system) does not signify that the United States authorized any such subcontractors to act on its behalf as agents. MTL could (and indeed had to) subcontract certain repair and maintenance duties, but it was not authorized to delegate any of its management or operational responsibilities to a third

party. Thus, appellees cannot qualify as subagents of the United States. *See* Restatement (Second) of Agency § 5(1). The Agreement authorized MTL, and MTL alone, to manage and conduct the business of the CAPE DIAMOND. *Cf., e.g., Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911, 912 (5th Cir. 1974) (company "engaged to manage and conduct the business of the Government with respect to the operation of certain Navy tankers" was agent of the United States under § 745); *Buck Kreihs*, 741 F. Supp. at 1251 (generally, "contract operator" of naval vessel is considered agent of the United States for purposes of § 745).

In light of these facts, it is evident that appellees were merely non-agent independent contractors of the United States. Restatement (Second) of Agency § 14N, cmt. b, defines a non-agent independent contractor as "[a] person who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other." The term, the Restatement notes, "is used colloquially to describe builders and others who have contracted to accomplish physical results not under the supervision of the one who has employed them to produce the results." *Id.* We think it apparent that appellees' contractual relationship with the United States falls squarely within this definition.

B.

For purposes of the SAA, a primary factor in determining agency status is the degree of operational control exercised by the United States. *See, e.g., Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (reasoning that degree of United States' operational control determines agency status under the Jones Act); *Nelson*, 805 F.Supp. at 847. In the instant case, the United States exercised no operational control over appellees' day-to-day performance of

their contractual duties. At most, the Ship Manager's Agreement permitted the United States to approve contractors' bills and to direct MTL to terminate a contractor or subcontractor.

> *Contractors*. The Ship Manager shall exercise due diligence in the selection of contractors. The fees and expenses of contractors utilized to aid in the performance of services and functions required herein on such terms and for such periods of time as the Ship Manager deems necessary, and are approved by the Government, shall be included in the costs to be reimbursed by MARAD. The Ship Manager shall promptly terminate any contractor not satisfactory to the Government upon written instructions from the Contracting Officer or his designated representative. The use of contractors shall be subject to a bonding requirement if determined by the Contracting Officer.

Ship Manager's Agreement Section C-5.4 ¶ 5.4.1.31.

This provision in no sense granted the United States "control" over the physical performance of appellees' contractual duties. Nor did any of the contracts under which appellees performed the various repair and maintenance tasks cede control over their efforts to the United States. In the absence of such operational control by the government, we cannot agree with the district court that the limited oversight the United States did retain in the Ship Manager's Agreement was adequate to render appellees its agents. *Cf. Williams v. United States*, No. 94-1698, slip op. at 10 (4th Cir. Mar. 31, 1995) (noting that United States is not liable under Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, by virtue of entering contracts and demanding compliance with federal standards in absence of actual supervision over "day-to-day operations" of contractor's work); *Leone v. United States*, 910

F.2d 46, 50 (2d Cir. 1990) (finding no governmental liability under Federal Tort Claims Act, although United States" act[ed] generally as an overseer," when United States did not manage details nor supervise daily activities of alleged tortfeasors), *cert. denied*, 499 U.S. 905 (1991).

C.

Finally, in determining the scope of the statutory term "agent" under the SAA, we must refer to the entirety of § 745's text. A proviso to § 745, enacted concurrently with the exclusivity provision, permitted a one-time waiver of the statute of limitations in cases in which a plaintiff had erroneously brought suit against an "agent" -- that is, against "any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel." 46 U.S.C. app. § 745.

The exclusivity clause and this proviso must be read *in pari materia*. *Petition*, 367 F.2d at 510; *Nelsen v. Research Corp. of Univ. of Hawaii*, 752 F. Supp. 350, 356 (D. Haw. 1990). Hence, it can reasonably be concluded that the term "agent" as used in the exclusivity provision is synonymous with one who is "engaged by" the United States "to manage and conduct the business of" a government vessel. None of the appellees herein were engaged "to manage and conduct the business of" the CAPE DIAMOND and thus, under the terms of the statutory definition, none were agents of the United States.

IV.

In the absence of a clear signal from Congress that in intended to subject the United States to broad-ranging liability, we decline to hold that contractors or subcontractors

such as appellees are "agents" within the meaning of the SAA. To do otherwise, the government notes, raises the specter of governmental liability for every act of negligence by a painter or plumber engaged to perform some limited task aboard a United States vessel, regardless of that party's contractual relationship with the government. Indeed, because the SAA waives the government's sovereign immunity, that statue must be strictly construed in favor of the United States. *See, e.g., McMahon v. United States*, 342 U.S. 25, 27 (1951). Such a construction requires that the term "agent" be read to exclude governmental liability for the negligence of independent contractors who are engaged to perform limited tasks aboard government vessels and who are subject to the United States' operational control.

V.

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:94cv202

ISABELLA SERVIS, ADMINISTRATRIX
of the Estate of Peter Thomas Humphrey,

Plaintiff,

v.

HILLER SYSTEMS INC.,
NORFOLK SHIPBUILDING AND DRYDOCK CORP.,
VALCON SALES AND SERVICES, INC.,
JASON B. NUSS,
WAYNE FRANCIS MUTH,
EDWARD SPEARY, III,

Defendants.

and

NORFOLK SHIPBUILDING AND DRYDOCK CORP.,

Third-Party Plantiff,

v.

UNITED STATES OF AMERICA,

Third-Party Defendant.

OPINION AND ORDER

This matter is before the Court on defendants' motions to dismiss and plaintiff's motion to remand the matter to the state court where it was originally filed. The United States made a special appearance in support of the plaintiff's motion to remand.[1]

This case concerns the interaction between the savings to suitors clause of 28 U.S.C. § 1333 and the "exclusivity" provision of the Suits in Admiralty Act ("SAA"), 46 U.S.C. Appx. § 745. The question is whether a plaintiff may save his right to proceed in state court (with a jury) by naming only subcontractors as defendants, or whether these subcontractors should be considered "agents" for the purposes of the SAA and, therefore, the sole remedy should be against the United States in federal court (and without a jury). For the reasons discussed below, this Court holds that subcontractors performing the work contracted for by a prime contractor with the United States should be considered agents for the purpose of the SAA's exclusivity provision.

I. Facts and Procedural History

A. The Incident

Peter Thomas Humprey was an electrical technician employed by Valcon Systems Engineering, Inc. (hereinafter "VSE"), a subcontractor of Norshipco Norfolk Shipbuilding and Drydock Company (hereinafter "Norshipco"). At the

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[1] By order entered April 29, 1994, the Court extended the time for the United States to answer the third-party complaint in this matter until ten days following the entry of this order.

time of the accident that gives rise to this proceeding, Humprey was working in the engine room of the "CAPE DIAMOND." While working on the ship, he died. Plaintiff alleges that Humphrey along with a Coast Guard Lieutenant was asphyxiated by the carbon dioxide ("CO_2") released into the engine room during a faulty test of the fire suppression equipment.

Plaintiff alleges that several errors were made both in the re-installation of the valve which contributed to the accident and in the conduct of the test itself. At the time of the reinstallation of the aft tank main shut-off valve, plaintiff alleges several errors were made: 1) the valve was missing an arrow indicator which would permit visual confirmation that the valve was closed; 2) two bolts were used that were too long; 3) the valve was covered with lagging (insulation); and 4) the lagging was covered with a 1/4 bypass valve which permitted CO_2 to bypass the main shut-off valve and flow directly into the manifold or header.

A test of the system was scheduled for March 3, 1993. The test requires a release of CO_2 in various areas of the ship. Norshipco had previously promulgated a company rule requiring all personnel to be evacuated before any testing of the CO_2 system.

Wayne Francis Muth and Edward Speary, Hiller employees, conducted the test on March 3, 1993. They decided to test the system in the engine room first. No order was ever given to evacuate the engine room. No effort was made to ensure that the engine room area was evacuated.

They intended to conduct a "puff test" by releasing a small amount of CO_2 into the engine room. First, one valve was opened to allow CO_2 to move from the main tank into the manifold or header. This valve was then supposed

to be closed. Then a second valve was opened to release the gas into the test area and activate the alarm systems.

The idea was to let a small amount into the manifold using the first valve, to close the first valve, and then conduct the test by opening the second valve, releasing a "puff" of CO_2. However, the first valve was not completely closed when the second valve was opened resulting in a massive release of CO_2 into the test area (the engine room). The CO_2 asphyxiated plaintiff and a Coast Guard officer.

B. Procedural History

On January 18, 1992, plaintiff filed a motion for judgment in Norfolk Circuit Court naming as defendants Norshipco, VSE, Hiller, and Hiller employees, Nuss, Muth, and Speary. Plaintiff alleged that Hiller was both negligent and grossly negligent in the hiring and training and supervision of its employees, in the removal, repair, and re-installation of the valve, in the conduct of the CO_2 puff test, and in the hiring of subcontractors and their actions. Plaintiff made the same allegations against the three Hiller employees in their individual capacity. Plaintiff alleged that VSE was both negligent and grossly negligent in its inspection and repair of the valve and its failure to replace a missing shut-off indicator plate or to warn others dependent on their work. Finally, plaintiff aalleged that Norshipco was both neglegent and grossly negligent in the hiring and supervision of the subcontractors and in its failure to evacuate the engine room or provide any warning. This complaint did not name the United States in either of its capacities (MARAD or the Coast Guard), nor did it name the prime contractor, MTL.

On February 16, 1992, Norshipco removed this action to this Court alleging that the complaint stated a federal question under the SAA or Public Vessels Act or both and

that the exclusive remedy was against the United States in federal court.

Norshipco then filed a third-party complaint against the United States. In that complaint, Norshipco alleged that MARAD, MTL and the Coast Guard failed to provide advance notice of the test so that proper safety precautions could be taken; that MARAD, MTL and the Coast Guard failed to conduct the test in a proper manner and did not take reasonable precautions for the safety of persons aboard the ship; and, that the CAPE DIAMOND was unseaworthy.

Subsequent to the removal, all of the defendants filed motions to dismiss the case arguing that plaintiff's sole remedy was against the United States. Plaintiff, however, filed a motion to remand based upon the savings to suitor clause of 28 U.S.C. § 1333 and its interpretation in Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959). Both the motion to remand and the motions to dismiss turn on the same questions of law presently before the Court.

All parties briefed the issues and on April 21, 1994, this Court heard oral arguments on the issues. After argument, the Court requested that all of the parties submit any additional authority or argument they desired on two issues. First, the Court requested authority on which forum -- the state or federal court -- was the proper place to resolve these questions. Second, the Court invited the parties to submit any relevant portions of the extensive contractual documentation.

After receiving these materials and taking them under consideration, the Court recognized the unique procedural stance of the case allowed the Court to consider facts outside of the pleadings with regard to the motion to remand but not for the motions to dismiss, despite the reality that both

motions turned on the same issue. In order to avoid this procedural morass, this Court, by order dated June 1, 1994, converted the motions to dismiss to motions for summary judgment and provided a final opportunity to supplement the record with additional facts or argument. All parties have submitted these materials, and this matter is now ripe for decision.

C. Relationship of the Parties

In 1985, the United States purchased the CAPE DIAMOND, a "roll on/roll off" cargo ship, through the United States Maritime Administration (MARAD), an agency of the U.S. Department of Transportation. The CAPE DIAMOND was purchased as part of the Ready Reserve Force (RRF). The RRF consists of over 90 vessels capable of transporting military cargo, fuel, equipment, munitions, and other supplies in support of the military forces of the United States. MARAD has the responsibility of maintaining the RRF, which entails making sure the vessels can be activated, crewed, and ready to sail within a period of 5 to 30 days. In order to accomplish this, MARAD contracts with private companies to maintain the RRF and, if necessary, to activate, crew, and operate the vessels.

The United States entered into a Ship Manager's Agreement with Marine Transport Lines, Inc. (hereinafter "MTL"). Pursuant to this agreement,[2] MTL and its

[2]There appear to be several different incarnations of the agreement between MTL and MARAD. While the parties suggest that the original agreement was entered into in November of 1986, they agree that contract No. DTMA91-88-C-80012 designates MTL as the agent of MARAD between February 29, 1988 to August 1, 1993.

contractors made extensive repairs and modifications to the CAPE DIAMOND. Part of these modifications involved the low pressure CO_2 fire protection system.

In March of 1992, MARAD apparently contracted directly with Norshipco to "deactivate" the ship.[3] In October of 1992, Norshipco subcontracted some of this work to Hiller Systems Inc. (hereinafter "Hiller"). Norshipco subcontracted with Hiller to test and inspect the CO_2 system. As part of its condition report to Norshipco filed in October 1992, Hiller

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Also in the Court's record of this case is contract No. DTMA92-92-C-203003. As part of a Freedom of Information Request, MARAD produced this agreement to counsel for VSE, who submitted that portion of the contract to the Court during oral arguments. The submitted agreement is "issued by" MTL as "Ship Managers for DOT/MARAD." The offeror, i.e., the winning bidder on the contract, was Norshipco. The contract is apparently for the "deactivation" of the CAPE DIAMOND.

In response to the Court's last request for additional information in this matter, Norshipco submitted an affidavit from Ernest Reilly, Jr., Vice President, Estimating and Contract Administration for Norshipco. In this affidavit, Reilly indicates that this second agreement (DTMA92-92-C-203003) governed the work on the fire suppression system at issue.

[3]This contract has the same cover page as the Ship Manager's Agreement, i.e., Standard Form 33 from the General Services Administration. It is dated May 11, 1992. The contract is issued by MTL as Ship Manager's for MARAD. William Daraghy, apparently an employee of MTL's, signed the form as contracting officer for the United States.

reported that there were leaks in the aft tank valve Hiller recommended replacement of the valve.

In or about November of 1992, a decision was made that CAPE DIAMOND would not be deactivated but instead put on "reduced operating status." Pursuant to this change, the deactivation contract was apparently replaced with a contract between MARAD and Norshipco.[4] Hiller remained a subcontractor to Norshipco under this contract. On December 3, 1992, Hiller was authorized to proceed with the recommended repairs. On December 15, 1992, Hiller removed the aft tank main shut-off valve (and other valves) and sent them to VSE for inspection, testing, and repair. On December 28-29, 1992, VSE inspected and tested the valves and returned them to Hiller.[5] On or before January 4, 1993,

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[4]This contract was not submitted to the Court by any party.

[5]VSE contends that it did not inspect the particular valve at issue in this case. They have submitted an affidavit of Leo Vincent Facenda, formerly an estimator with VSE. In his affidavit, Facenda contends that, based on his personal recollection and review of the business records, VSE never worked on any valves from the CAPE DIAMOND. Rather VSE worked on valves from the sister ship CAPE DOMINGO. Furthermore, Facenda contends that none of the valves it did work on were of the type (4" gate valve) alleged to have contributed to the accident in this case.

This factual issue, which remains in contention, is not material to the resolution of the agency issue. For the purposes of this motion, the Court will assume that VSE did work on the valve and will consider only whether a sub-subcontractor such as VSE is an "agent" for the purposes of § 745.

Hiller replaced the valves in the CAPE DIAMOND using temporary employees. Plaintiff alleges that several errors were made in the re-installation of the aft tank main shut-off valve.

On March 1, 1993, Michael Ford, a representative of MTL, hired Hiller to recharge CO_2 system and to repair known leaks, test the actuation and alarm devices, and certify the system to the Coast Guard and provide inspection certificates.[6] A test of the system was scheduled for March 3, 1993. Wayne Francis Muth and Edward Speary, also Hiller employees, conducted the test in the presence of a Coast Guard representative on March 3, 1993. Plaintiff was killed during the conduct of the test.

D. Contractual Provisions

The Ship Manager's Agreement (the "SMA" or the "Agreement") is a lengthy document with many attachments and annexes. At oral argument and again upon converting the motions to summary judgment, the Court directed the parties to submit any parts of this agreement which they found relevant, particularly those portions concerning responsibility for repairs and concerning the allocation of liability between the parties. The Court is now in receipt of

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[6]Again, this was pursuant to a separate agreement. On this occasion, rather than acting as a subcontractor of Norshipco's, Hiller was apparently hired directly by MTL. In his affidavit, Jason Nuss, Operations Manager with Hiller, states that he was contacted by Michael Ford, who was working for MTL as the Contracting Officer's Technical Representative coordinating the reactivation inspection required by the Coast Guard. Nuss attached his March 1, 1993 confirmation letter and the March 4, 1993 confirmation purchase order from MTL to his affidavit.

a variety of materials on these subjects.

Several of the defendants have submitted portions of the contracts pertinent to this issue as well as affidavits from the relevant employees stating their understanding of the contractual relationships. The plaintiff has now submitted what it believes are the relevant portions of the SMA along with part of a Memorandum of Understanding which describes the operational relationships between MARAD, the Coast Guard, and the agents of MARAD such as MTL.

The United States never submitted any portion of the contract, relying instead on its position that "no portions of that contract are pertinent to this issue. . . the United States submits that there is no basis in law for allowing subcontractors to attempt to bootstrap themselves into agent status by reference to excerpted portions of the ship manager's contract." However, upon conversion of the motions to summary judgment, the United States did submit the affidavit of Tim P. Roark, Sr., the contracting officer for all Ship Manager Contracts and General Agency Agreements for the RRF.

Review of the submitted portions of the SMA issued by MARAD to MTL reveals typical language assigning general responsibility for the ship to the prime contractor. Thus, MTL is to provide "management, personnel, operational and technical support, and supplies to maintain ships of the Ready Reserve Force (RRF) and operate when tasked as specified." Section C-1, 1.2. In slightly more specific language, the SMA describes the general duties of MTL in Phase IV, the Maintenance and Repair stage. The Ship Manager is to

> Equip, victual, supply, and arrange for the repair of the vessel including hull, machinery, boilers, tackle,

> apparel, furniture, equipment and spare parts, and including maintenance and voyage repairs and replacement, as directed to maintain the vessel in an efficient state of repair and condition.

Section C-5.4, 5.4.1.1.

Clearly contemplated as within the scope of MTL's agency under the SMA is the hiring of subcontractors to undertake portions of the work under the Agreement. Numerous provisions make direct and indirect references to hiring subcontractors (or sometimes "industrial assistance") to undertake work for which MTL is ultimately responsible. For instance, several sections outlining the Ship Manager's Duties all contain the same language indicating that this duty is to be fulfilled at least in part by the use of subcontractors. This language requires the Ship Manager to prepare specifications for contracts, seek competitive bids for contractors, and then award and supervise such projects on behalf of MARAD. Sections C-5.4, 5.4.1.4; 5.4.1.7; and 5.4.1.12. Furthermore, in "Technical Exhibit 8, Maintenance Measures" the SMA specifically provides for the use of Coast Guard certified contractors to inspect, test, and certify all fixed and portable carbon dioxide extinguishing systems. Section 81.01.

Finally, the Agreement outlines MTL's general responsibilities with regard to subcontractors:

> Contractors. The Ship Manager shall exercise due diligence in the selection of contractors. The fees and expenses of contractors utilized to aid in the performance of services and functions required herein on such terms and for such periods of time as the Ship Manager deems necessary, and are approved by the Government, shall be included in the costs to be

> reimbursed by MARAD. The Ship Manager shall promptly terminate any contractor not satisfactory to the Government upon written instructions from the Contracting Officer of his designated representative. The use of contractors shall be subject to a bonding requirement if determined by the Contracting Officer.

Section C-5, 5.4.1.31.

With regards to distributing liability among the parties, very little was submitted.[7] The plaintiff as well as counsel for VSE did provide section H-22 which addresses the issue of insurance. That section reads as follows:

> The government will self insure for all liabilities on this contract in accordance with current coverage for P&I, Hull and Machinery, and third person liability insurance. Gross negligence on the part of the Ship Manager will nullify this coverage. This coverage extends to the Ship Managers and their employees. The Ship Manager is required to insure that their subcontractors and vendors offering supplies and services under reimbursable provisions have adequate insurance.

Section H-22.

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[7]Counsel for VSE intimates that the Agreement contains express provisions in support of the position that the United States reserves the rights to designate its own agents. However, as he notes, the United States has chosen not to submit such provisions.

II. Analysis

A. The Saving to Suitors Clause

All of the parties agree that the facts of this suit state a claim in admiralty. The question is whether plaintiff, by suing only the subcontractors involved and not the United States or its prime contractor, can receive the benefit of the saving to suitors clause and bring this suit as an in personam case in state court.

The statute establishing the admiralty jurisdiction of the federal courts provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333. The leading Supreme Court case on the "saving to suitors" clause of this statute extensively reviews the history of admiralty jurisdiction and the saving to suitors clause and concludes that a claim brought pursuant to the general maritime law should not be removable under the federal courts' federal question jurisdiction. Romero, 385 U.S. at 371-72, 79 S.Ct. at 480. Judge Clarke explained the effect of Romero in a 1990 opinion:

> Despite the apparent grant of exclusive federal jurisdiction in admiralty and maritime cases [in § 1333], the savings clause" is interpreted to reserve to suitors the right of a common law remedy "in all cases where the common law is competent to give it."

> . . . The rationale underlying the Court's decision in Romero was that if maritime claims "arose under" the laws of the United States, defendant, by use of the removal statute, could eviscerate the traditional choice of plaintiffs to elect a state law forum and remedy under the "saving to suitors clause" of 28 U.S.C. § 1331. Thus, it is now clear that, except when there exists some basis for federal jurisdiction other than admiralty, (such as diversity jurisdiction), maritime litigation brought in state courts cannot be removed to federal courts.

Coley v. Dragon, Ltd., 138 F.R.D. 460, 464 (E.D. Va. 1990) (citations omitted; emphasis added); Lewis v. United States, 812 F. Supp. 620, 622 (E.D. Va. 1993) ("a general maritime claim brought in state court . . . is generally not removable absent an independent ground of federal jurisdiction"). Thus, a plaintiff with an in personam maritime claim may choose to bring the claim in either state or federal court.

Cases such as Romero and Coley, however, only intended to prevent removal where the suit was based in general maritime law (in the absence of diversity jurisdiction). The language from these cases indicates that diversity jurisdiction is only one possible "independent basis for federal jurisdiction"; it does not limit removal where federal jurisdiction is established by statute. One of the leading authorities on admiralty law agrees that Romero should not be considered a bar to removal of cases based on "federal maritime legislation." T. Schoenbaum, Admiralty

and Maritime Law, § 3-13, at 117-18 (1987).[3] Thus, this Court holds that in addition to diversity jurisdiction, another "independent ground for federal jurisdiction" exists where specific federal statutes provide for a cause of action in federal court.

It is important to note that the requirement for a specific federal statute granting jurisdiction sufficiently protects the 'saving to suitors' option by allowing Congress to address the issue at the time of the passage of any such statute. For instance, in one of the most significant pieces of federal maritime legislation, the Jones Act, Congress specifically chose to protect to plaintiff's ability to choose a state or federal forum appropriately worded pleadings. This indicates that Congress understands the tension between new federal statutory causes of action and a plaintiff's traditional ability to choose the forum under the savings to suitor clause. Indeed, in the case of the Jones Act, Congress chose to protect plaintiff's choice of a forum from "evisceration by removal" at the same time it created a new federal statutory basis for jurisdiction.

In this case, both the SAA, 46 U.S.C. Appx. §§ 741 et seq., and the Public Vessels Act, 46 U.S.C. Appx. §§ 781 et seq., provide an independent grounds for federal jurisdiction, but do not preserve the plaintiff's right to choose a forum. The SAA and the Public Vessels Act provide for a non-jury proceeding against the United States where a proceeding in admiralty could otherwise be maintained if the

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[3]Schoenbaum also notes that a minority of courts "have rejected this approach and have held that even in a case involving a statutory claim, Romero's strong policy against evisceration of the 'saving to suitors' clause prohibits removal absent diversity." T. Schoenbaum, Admiralty and Maritime Law, § 3-13, at 117-18 (1987).

ship was privately owned. 46 U.S.C. Appx. § 742. No party contests that such a suit would be available on the facts of this case. However, plaintiff suggests that by refusing to name the United States or MTL, he has maintained his ability to proceed in state court by avoiding any federal question under the rule of the "well-pleaded complaint."

There may be instances where a plaintiff's choice of adversaries will preserve the choice of a forum, however, the Court need not consider that possibility in a case such as this. When the SAA provides a remedy,

> it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States . . . whose act or omission gave rise to the claim.

46 U.S.C. Appx. § 745. Thus, where the SAA provides a remedy, as it does here, this remedy is the exclusive remedy for the plaintiff against any employee or agent of the United States involved in the matter. The question turns, then, on the meaning ascribed by Congress to the words "agent or employee."

The case law clearly establishes that plaintiffs cannot escape the provisions of § 745 simply by refusing to plead their case against the United States. In the typical case, the plaintiff names as the defendant only the prime agent and not the United States. In those cases, plaintiff's complaint is dismissed pursuant to § 745 and plaintiff is required to bring the action against the United States. See, e.g., Smith v. United States, 346 F.2d 449 (4th Cir.), cert. denied, 382 U.S. 878 (1965); Petition of United States, 367 F.2d 505, 510 (3d Cir. 1966), cert. denied, Black v. United States, 386 U.S. 932 (1967); Landry v. United States, 815 F. Supp. 1000 (E.D. Tex. 1993); Tarver v. United States, 785 F. Supp. 607 (S.D.

Miss. 1991). These and many other cases like them demonstrate that courts must look behind the fact of the complaint to determine if the named defendant is within the "agent or employee" category protected by § 745.[9]

While these cases do not examine the application of § 745 to a subcontractor, the same principles should apply. The court must look behind the face of the complaint to determine if these subcontractors were the agents or employees of the United States. Plaintiff cannot avoid § 745 merely by refusing to name the proper defendant in his complaint.

When one considers the purpose of § 745, it is obvious that this is the only sensible rule. As the Fourth Circuit stated in Smith,

> The intent of [§ 745] was not to keep alive the liability of a private person, firm or corporation having charge of a Government ship. It was just to the contrary. It was the adoption of the exclusivity principle enunciated in Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S.Ct. 1317. Another purpose was to designate unequivocally the one to whom a claim for loss caused by the Government's ship should be directed, and to afford extra time for suit by those who had before erroneously proceeded against the contractor.

Smith, 346 F.2d at 453-54. To put the same principle into

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[9]In this case, the equivalent would have been if the plaintiff had named MTL and not the United States. All of the parties agree that MTL was the agent of the United States and that if plaintiff had named MTL, it would have violated the exclusivity provision of § 745.

different words, one of the purposes of § 745 is to make sure that claims which may ultimately involve the United States are brought exclusively against the United States in federal court. Thus, courts must look behind the pleadings in such cases and ascertain whether the contractor being sued is actually an "agent or employee" of the United States. To hold otherwise would allow plaintiffs to defeat the Congressional intent of § 745 by artful pleading.[10]

B. Are Subcontractors "Agents" For the Purposes of 46 U.S.C. Appx. § 745?[11]

Very few cases have explicitly considered the treatment of subcontractors under § 745. Defendants rely heavily on two cases from the Eastern District of Louisiana. Bowman v. Pan American World Services, Inc., 704 F. Supp.

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[10]An interesting question remains whether the United States (or a contractor to the United States who subcontracted the work to another) could contractually avoid the effects of section 745. The Smith court explicitly refused to take up this question. 346 F.2d at 454. Because the parties did not argue this theory and because none of the submitted contract provisions indicate an attempt to do so, this Court will not consider this possibility either.

[11]In their briefs and at argument, both the plaintiff and the United States argued that the state court was the proper forum for deciding the underlying issue of whether the subcontractors were agents for the purposes of the exclusivity provisions in the SAA. However, the United States has now changed its position, and the plaintiff concurs. Thus, all parties now agree that this Court is the proper forum for determining whether the subcontractors are agents for the purposes of the SAA.

695 (E.D. La. 1989); Saffrhan v. Buck Steber, Inc., 433 F. Supp. 129 (E.D. La. 1977). The facts of both cases involved suits against subcontractors of a primary contractor of the United States. Bowman, 704 F. Supp. at 697. Both Bowman and Saffrhan found the subcontractor to be an agent of the United States for the purposes of § 745.

As restated by Bowman, one of the premises of the Saffrhan decision was that

> even if the subcontractor was not the operating agent of the U.S., the primary contractor was. Therefore, the primary contractor could not, by subcontracting part of its responsibilities, alter the rights and obligations either of the U.S. or of employees enjoying Jones Act status on a public vessel.

Bowman, 704 F. Supp. at 698. The Bowman court explicitly stated that if found "nondispositive the degree of the Government's control over the operations in question in determining agent status under § 745 of the [SAA]." Id. (emphasis added). Despite this adamant position, the Bowman court also ruled on the alternative ground of control, holding that the subcontractor was ultimately controlled by the United States because the subcontractor did its work pursuant to the terms of the original contract with the United States. Id.

Plaintiff relies heavily on Nelsen v. Research Corp. of University of Hawaii, 805 F. Supp. 837 (D. Haw. 1992) for the proposition that mere ownership of the vessel by the United States is not sufficient to trigger the exclusivity provision of the SSA. The Nelsen court held that courts must use traditional agency principles in applying § 745. It held that the court must examine the agreement between the U.S. and the operator

> to determine to what extent, if any, (1) the government consented to allow [the operator] to act on its behalf and (2) [the operator] was subject to the government's control.

Nelsen, 805 F. Supp. at 847. In examining the agreement at issue, the Nelsen court observed that the operator was required to maintain and repair the boat, to maintain liability insurance, and to hold the government harmless from third party claims. The government did not consent to allow the operator to act on its behalf. Nor was the boat operated for the benefit of the United States. Looking at these facts, the Nelsen court found that the operator was not an agent under the SSA and could be sued independently. Id.

Plaintiff may be correct in relying generally on the principle of agency, but the finer aspects of common-law agency principles do not govern in this instance. In the first place, the language of the statute itself prevents suit against the "agents or employees" of the United States. This disjunctive language indicates the Congressional intent to cover a wide-range of possible master-servant relationships within the purview of the exclusivity principle. Consequently, courts interpreting this language have not been overly concerned with the details of common-law agency relationships.[12] The Third Circuit, in an often-cited case on this issue, established that Congress intended a broad application of agency principles when interpreting § 745. In that case, noting that the operator in question was an

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[12]Nor must there be consistency in interpreting these concepts in different statutes. River & Offshore Serv. Co. v. United States, 651 Supp. 276, 279 (E.D. La. 1987) (there is no compelling reason why Tucker Act and the SAA must use an identical test for determining who is an agent of the United States).

"independent contractor" rather than a "servant," the Third Circuit went on to explain:

> an independent contractor, no less than a servant, may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf. Restatement, Agency, 2d § 14 N.

Petition of the United States, 367 F.2d at 509; see also Smith, 346 F.2d at 453 (the legal title or categorization of the relationship is not determinative of agency status).

In another frequently cited passage, the Petition court found evidence in the Congressional history for a broad interpretation. Asked for comment on the bill, the Department of Justice recommended that the "agent or employee" language be expanded to read "employee, agent, or instrumentality." Congress, however, stated that such language was an "immaterial variation" on the language in the bill. The Petition court found that "[t]his indicates that in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels are operated." Id. at 510 (emphasis added). Finally, the court concluded that Congress intended to "make governmental liability exclusive throughout a broad spectrum of contractual arrangements for the operation of public vessels." Id. at 511. See also Landry v. U.S., 815 F. Supp. 1000 (E.D. Tex. 1993) (adopting Petition test); LeBlanc v. United States, 732 F. Supp. 709, 714 (E.D. Tex. 1990); Cruz v. Marine Transport Lines, Inc., 634 F. Supp. 107, 110 (D. N.J. 1986) (the focus should be on whether or not the party acted as a fiduciary to the government, undertaking to act on the United States's behalf, and whether

it was subject to the control and direction of the United States), aff'd without op., 866 F.2d 252 (3d Cir. 1986), cert. denied, 481 U.S. 1048 (1987).[13]

Applying these broad agency principles to the facts of this case reveals that defendants should obviously be considered agents of the United States for the purposes of § 745. In making this application, the Court must consider not only the terminology of the contract, but also the facts made a basis of this suit. All the parties agree that MTL is the general agent of the United States. Under their various subcontracts, all of the defendants named by plaintiff were performing work within the scope of the original Agreement. In fact, the Agreement specifically requires the Ship Manager to hire a subcontractor for much of the work on the fire suppression system that is at issue in this case.

In addition to these facts, the Agreement also gives the United States ultimate power over these contractors even if this power was not exercised as day-to-day operational control. The Agreement specifically reserves to the United

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[13]The United States, in its brief, interprets the Petition test as a "litmus test' of whether the person or entity was retained "to manage, conduct the business of, and operate" a vessel of the United States. The government explicitly notes that direct contractual privity is not required and that a subcontractor may be an agent for the purposes of § 745. Finally the government admits that MTL was certainly an agent of the government and that MTL was entrusted in its agreement with the United States to subcontract many of its duties in operating the ship. Despite all of these points, however, the United States still insists these subcontractors were not agents of the United States.

States the right to terminate any subcontractor at any time. The United States may also require contractors to be bonded if deemed necessary.

Thus, though these subcontractors may have been independent contractors for some purposes, this does not mean they are not agents or employees of the United States for the purposes of § 745. These defendants were undertaking projects on behalf of the United States, and they were subject to the United States' approval and ultimate control and direction. Restatement (Second) of Agency, § 14 N.[14] The contractual arrangements were clearly an "instrumentality through and by which" a public vessel was operated, making the defendants agents or employees under the broad view of "agent or employee" adopted in Petition of the United States, 367 F.2d at 510.

III. Conclusion

This Court finds that, at the time of the commission of the acts that are the basis of this suit, defendant subcontractors were agents or employees of the United States for the purposes of the Suits in Admiralty Act. Therefore,

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[14]See also Restatement (Second) of Agency, § 5(1) which states

> A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.

This definition of a subagent fits well with the terms of the Agreement which requires the Ship Managers to exercise due diligence in the selection of contractors, and allows and even directs the Ship Manager to subcontract parts of the work of the Agreement.

under the terms of 46 U.S.C. Appx. § 745, plaintiff's sole and exclusive remedy is against the United States in federal court. Accordingly, plaintiff's motion to remand is DENIED. Because the Court has found that defendants were agents or employees for the purposes of the Suits in Admiralty Act, it must also GRANT all of the defendants' motions for summary judgment as to the plaintiff's complaint, but without prejudice as to the defendants' liability, if any, to the United States. Finally, because Norshipco's third party complaint against the United States is based largely on derivative liability of the United States under theories of contribution and indemnity, this Court must also DISMISS the third party complaint.

However, while this order would effectively terminate plaintiff's cause of action against these defendants, the Court recognizes that the likely result of this disposition is that plaintiff will exercise its exclusive remedy against the United States in federal court and that the United States will more than likely then sue for contribution against the some or all of the same defendants. Accordingly, in order to avoid any potential problems with the statute of limitations or other procedural problems, the Court GRANTS leave to plaintiff to amend her complaint to substitute the United States as the appropriate defendant. Any such amended complaint must be filed within thirty (30) days following the date of this order. Should such a complaint be filed, the United States shall then be given thirty (30) days thereafter to file its answer and any third party claims or any other claims against any of the original defendants named herein or against any other person, firm, or corporation.

The Clerk of the Court is DIRECTED to forward copies of this order to counsel for each of the parties including the United States.

IT IS SO ORDERED.

Robert G. Doumar
UNITED STATES DISTRICT JUDGE

At Norfolk, Virginia
June 29, 1994

FILED July 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1979
CA-94-202-2

ISABELLA SERVIS, Administratrix of the Estate of Peter Thomas Humphrey

Plaintiff - Appellant

v.

HILLER SYSTEMS INCORPORATED; JASON B. NUSS; WAYNE FRANCIS MUTH; EDWARD SPEARY, III;

Defendant - Appellees

and

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION;

Defendant & Third Party Plaintiff - Appellee

VALCON SALES AND SERVICES, INCORPORATED

Defendant

v.

UNITED STATES OF AMERICA

Third Party Defendant

MICHAEL G. MILLER, Executor, SADIE R. RICHARDSON, Administratrix, c.t.a., of the Estate of William B. Turek

Amici Curiae

No. 94-2103
CA-94-202-2

ISABELLA SERVIS, Administratrix of the Estate of Peter Thomas Humphrey

Plaintiff

v.

HILLER SYSTEMS INCORPORATED; JASON B. NUSS; WAYNE FRANCIS MUTH; EDWARD SPEARY, III;

Defendants - Appellees

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION;

Defendant & Third Party Plaintiff - Appellee

SADIE R. RICHARDSON, Administratrix, c.t.a., of the Estate of William B. Turek

Amicus Curiae

and

VALCON SALES AND SERVICES, INCORPORATED

Defendant

v.

UNITED STATES OF AMERICA

Third Party Defendant - Appellant

MICHAEL G. MILLER, Executor of the Estate of William B.Turek

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk